In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 663

NEWSPAPER DRIVERS & HANDLERS LOCAL UNION NO. 372, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, IND., PETITIONER

v.

DETROIT NEWSPAPER PUBLISHERS ASSOCIATION, ET AL., AND THE NATIONAL LABOR RELATION BOARD

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

Petitioner ("the Union"), the charging party before the Board, seeks review of the judgment of the court below denying enforcement of an unfair labor

practice order which the Board had issued against the Detroit News.[1]

The relevant facts, as found by the Board (Pet. 23-29, 43-53), may be summarized as follows:

1. The Union represents, in separate bargaining units, certain of the employees of the News and of the Detroit Free Press. In October 1961, the Union notified each paper—which negotiated through the Detroit Newspaper Publishers Association—of its desire to revise the contract that was due to expire in November. Between the end of October 1961 and March 1962, the Union had a series of bargaining meetings with each newspaper separately. On April 6, the Union presented a revised proposal to the Free Press and advised that strike action would be recommended on April 11 if a satisfactory offer was not received by that date.

2. The last meeting between the News and the Union had been on March 22, when the Union had agreed to submit revised contract proposals. On April

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[1] The Union was a party to the proceedings in the court below, having petitioned to review those parts of the Board's order adverse to it. The Board, although finding that the News had violated the Act in locking out its employees as described *infra*, dismissed the complaint insofar as it charged that the Association and the Detroit Free Press were responsible for this unfair labor practice and that the agreement between the Free Press and the News by which the latter agreed to suspend publication if the Union struck the former (see text, p. 3) violated the Act. The Union sought review of this dismissal, and thus has standing to petition for certiorari. *International Union of Mine, Mill and Smelter Workers* v. *Eager-Picher Mining and Smelting Co.*, 325 U.S. 335, 338-339.

9 and 10, officials of the News met with officials of the Free Press. These officials found that ten of the eighteen issues in dispute between the Free Press and the Union also were of interest to the News. The News urged the Free Press not to capitulate on three of these issues under any circumstances, and promised that, if the Union struck the Free Press over those issues, it would support the Free Press and would not publish. The two papers further agreed that they would not inform the Union that a strike against one would be treated as a strike against both, or that the News would not publish if there were a strike at the Free Press.

3. On April 11, the Free Press gave the Union its "last best offer," which the latter rejected. A strike ensued. On April 12, the Union submitted its revised proposals to the News. Pursuant to its agreement with the Free Press, the News ceased publication on that day, but did not lay off any of its employees until April 16. On April 19, the Free Press and the Union agreed to new contract terms, the Union ended the strike against the Fress Press and the News ended its lockout.

On these facts, the Board concluded that the News locked out its employees from April 16 through 19 because of the strike against the Free Press; that since the two papers did not bargain in a multi-employer unit, the lockout was not privileged under the *Buffalo Linen* doctrine [2] which sanctions the use of a lockout

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[2] *National Labor Relations Board* v. *Truck Drivers Local Union No. 449*, 353 U.S. 87.

to preserve the integrity of a multi-employer unit; and that accordingly the News abridged the rights of its employees in violation of Sections 8(a)(1) and (3) of the Act.[3] The Board ordered the News to cease and desist from the unfair labor practices found, and to reimburse the employees who were unlawfully locked out for any loss of pay they may have suffered. (Pet. 28-31.)

The newspapers and the Union (see n. 1, *supra*) filed petitions to review the Board's order and the Board cross-petitioned for enforcement. While the case was under submission, this Court held, in *American Ship Building Company* v. *National Labor Relations Board*, 380 U.S. 300, that an employer in a single bargaining unit did not violate the Act by temporarily laying off his employees, after an impasse in the bargaining had been reached, for the purpose of securing his contract terms. Viewing the present case as governed by that holding, the court below found that the lockout by the News was privileged and set aside the Board's order (Pet. 13-20). The Board filed a petition for rehearing, urging that the case should be remanded for reconsideration in the light of *American Ship* and the subsequent decision in *United Mine Workers* v. *Pennington*, 381 U.S. 657. The court below denied the petition (Pet. 86).

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[3] The Board found a violation not only with respect to the employees in the unit represented by the Union, against whom the lockout was specifically directed, but also with respect to the other employees who were laid off in consequence of the unlawful lockout against the unit employees (Pet. 28-29).

The Board decided the case on the theory that a lockout, even though motivated by economic considerations, was barred by the Act, except where it was used to preserve a multi-employer unit or to safeguard a single employer against unusual operating hazards. In *American Ship*, this Court rejected that theory, holding that *after* an impasse in the negotiations had been reached, a single employer could use a lockout to advance his bargaining position. The Court, however, did not decide whether a lockout *before* impasse is permissible (380 U.S. at 308). Moreover, since only a single employer was involved, it had no occasion to pass on the further question whether an employer in one bargaining unit could lock out to advance the position of another employer in a different bargaining unit. And, in the subsequent *Pennington* case, the Court indicated that it was contrary to national labor policy for a union and an employer in one bargaining unit to bargain respecting conditions in another unit.

Whether the factors of lack of impasse and different bargaining unit, either singly or in conjunction,[4] are enough to warrant a different result than that reached in *American Ship* presents difficult problems of law and policy which should be passed on, in the first instance, by the Board. See *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 331 U.S. 416, 428. Accordingly, the court below, instead

[4] Both factors are present here, since the News locked out before an impasse had been reached in its negotiations with the Union, and did so in support of the bargaining position of Free Press, which was in a separate unit.

of initially deciding the issue itself, should have remanded the case to the Board for reconsideration in the light of this Court's intervening decisions—as two other courts of appeals did with lockout cases which the Board had decided before *American Ship*. *National Labor Relations Board* v. *American Stores Packing Co.* (C.A. 10), September 16, 1965, 60 LRRM 2128; *Simplot Co.* v. *National Labor Relations Board* (C.A. 9), June 29, 1965, 60 LRRM 2096. See also *Amalgamated Meat Cutters* v. *National Labor Relations Board (Kroger Co.)* (C.A. D.C.), July 13, 1965, 60 LRRM 2032, in which the court remanded to consider the effect of *National Labor Relations Board* v. *Brown*, 380 U.S. 278. But cf. *Body & Tank Corp.* v. *National Labor Relations Board* (C.A. 2), April 21, 1965, 59 LRRM 2123.

For these reasons, the Board does not oppose the grant of the petition. It suggests, however, that, since it has not considered the substantive issues in the light of *American Ship* and *Pennington*, the Court should summarily vacate the judgment of the court of appeals and remand the case to the Board for reconsideration. See *Federal Trade Commission* v. *Texaco, Inc.*, 381 U.S. 739; Pet. 12.

Respectfully submitted.

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